# THE MILITARY CHAPLAINCY AND THE CHURCH-STATE ISSUE

Subcourse 85

Writing Skills

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# THE MILITARY CHAPLAINCY AND THE CHURCH-STATE ISSUE

Introduction:

The modern-day military chaplain faces many challenges, opportunities and at times, obstacles. The old "church-state" issue has raised its head again in the form of a Federal Court suit challenging the constitutionality of the military chaplaincy.[1] With this issue comes deep emotional discussion from both opposing points of view. Over the years, certain preconceived notions regarding the "separation question" have bedeviled our society. Any quick resolution of the complexities surrounding the "separation question" appear to be distant in coming due basically to the lack of effective communication between the opposing points of view on the subject. In a quest for reason, we must be willing to explore the entire breadth and depth of the existing church-state relationship and at the same time be willing to reconsider preconceived notions of right, wisdom and law. Simply stated, if solutions are to be forthcoming, individuals from both opposing points of view must be willing to sit down and talk with one another and not simply talk at one another. Diverse views and differences must be discussed openly. Frankly, far too much is written and discussed by both sides regarding the "separation question" which does little toward promoting any "better understandings." It is possible that we need more dialogue and far less diatribe![2]

To enable the modern-day chaplain in our complex pluralistic society to cope with the continuing question surrounding separation of church and state, the following brief has been prepared to allow a perspective on the basic question of "separation," where the concept originated, the heated discussion surrounding it in framing the Constitution and the later application of the law as determined by the U.S. Supreme Court.

To bring the "church-state" issue directly into focus, regarding the "chaplaincy in the military," the basic premise, as I understand it, must be examined from the opposing points of view:

Pro: The chaplaincy is an essential peace-loving part of our national heritage which has its historical roots in the very documents and actions from which sprang the Declaration of Independence and Constitution. It has served a basic purpose for men and women of all religious backgrounds, past and present, and is deemed essential to serve those constitutional guarantees regarding the "free exercise provisions" of the First Amendment within a military setting.

Con: It is unconstitutional for the United States Government to expend public dollars in support of "religion." The military chaplaincy is therefore in conflict with the constitutional prohibition of separation of church and state due to the fact that it supports "religion" and is funded by public dollars.[3]

A Brief:

In attempting to analyze the "separation question" from an historical point of view, it is easy to understand the basic confusion which exists in the minds of people in general regarding the entire separation issue. To help provide chaplains with some perspective on the subject of the "separation" or "establishment clause," and to allow one to become more informed, the following brief may be helpful.

First, the real intent of the "establishment clause" appears to be clear. It did not allow: (1) a state or the federal government to establish "a church," (2) neither a state nor the federal government can pass laws which aid one church, aid all churches, or prefer one church over another; neither can force

nor influence a person to a belief or disbelief in any church. Further, no person can be punished for entertaining or professing a church belief or disbelief, or for church attendance or non-attendance, (3) no tax in any amount can be levied to support any church activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice particular church beliefs at the expense of others, and neither a state nor the federal government can, openly or secretly, participate in the affairs of any specific church organization or group and vice versa.[4]

Second, in a 1975 Supreme Court case, "Meck v. Pittenger," which embraced the "establishment issue," wherein the Court reviewed its "three part test" in "establishment clause" cases: (1) the statute must have a secular legislative purpose (Epperson v. Arkansas, 393 U.S. 97), (2) statutes must have a "primary effect" that neither advances nor inhibits religion (School District of Abington Township v. Schempp, 374 U.S. 203), (3) the statute and its administration must avoid excessive government entanglement with religion (Walz v. Tax Commission, 397 U.S. 664), it is clear that the Court reviewed and accepted the three general areas set forth in earlier decisions.[5]

These tests constitute a convenient, accurate distillation of the Supreme Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the Constitutional prohibition against laws "respecting an establishment of religion." It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary consitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the "establishment clause" have been impaired.[6]

Third, the primary evils against which the "establishment clause" protects have been "sponsorship, financial support and active involvement of the sovereign in religious activities;" (Walz v. Tax Commission, suppra. 397 U.S., at 688;

Lemon v. Kurtzman, 403 U.S. at 612 and Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S., at 772). The court has broadly stated that "no tax" in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[7]

Further, it is also clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. The problem, like many problems found in constitutional law, is one of degree.[8]

Historical Perspective:

It is a matter of history that the practice of establishing governmentally-supported religions was one of the major reasons which caused many of our early colonists to leave Europe and seek religious freedom in America. For example, the Book of Common Prayer which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549 set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time.

As a result, powerful groups within England, representing some of the varying religious views of the people, struggled among themselves to impress their particular views upon the government and to obtain amendments of the Book more suitable to their particular notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs. On the other hand, groups lacking the necessary political power

to influence the government on the matter, decided to leave England and its established church and seek freedom of religious worship in America far from the governmentally-ordained and supported religion of England, as well as other similar conditions existing in other European countries.

It is also an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England, for example, found themselves sufficiently in control of colonial governments in America, laws were passed by many of these groups making their own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight (8) of the thirteen (13) former colonies and established religions in at least four (4) of the other five (5).

For example, the Church of England was the established church of at least five (5) colonies: Maryland, Virginia, North Carolina, South Carolina and Georgia. There seems to be some controversy as to whether that church was officially established in New York and New Jersey, but there is no doubt that it received substantial support from those state governments. On the other hand, in Massachusetts, New Hampshire and Connecticut, the Congregationalist Church was officially established. In Pennsylvania and Delaware, all Christian sects were treated equally in most situations but Catholics were discriminated against in some respects. In Rhode Island, all Protestants enjoyed equal privileges but it is not clear whether Catholics were allowed to vote.[9]

A good example of early colonial bias of one religion over another is set forth by "The Commission of New Hampshire" in a statement regarding matters of conscience in 1680:

> Above all things we do by these presents will, require and command our said Counsill to take all possible care for ye discontenancing of

> vice and encouraging of virtue and good living; and that by such example ye infidle may be invited and desire to partake of ye Christian Religion, and for ye greater ease and satisfaction of ye sd loving subjects in matters of religion, we do hereby require and comand yt liberty of conscience shall be allowed unto all protestants; yt such especially as shall be conformable to ye rites of ye Church of Engd shall be particularly countenanced and encouraged.[10]

This was again reinforced in 1781 when the State of New Hampshire adopted a constitution which kept the church as a tax-supported town institution and expressed itself in favor of the Protestant religion. A similar situation existed in Massachusetts as a result of their constitution adopted in 1780.[11]

Through such measures, the people were taxed, many times against their will for the support of religion, and sometimes for the support of particular religious sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the colonies, but seemed at least to culminate in Virginia where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were actually a minority themselves.

Some 104 years after the statement by "The Commission of New Hampshire," the House of Delegates of Virginia met in 1784 and took under consideration "A Bill Establishing Provision for Teachers of the Christian Religion." This bill was postponed until the next session for several reasons; one was that its major supporters wished the bill to be published and distributed and that the people be requested to "signify their opinion respecting the adoption of such a bill at the next session of the Assembly."[12]

Two very energetic and outspoken members of the Virginia Assembly who led the fight against this provision were James Madison and Thomas Jefferson because

it constituted a tax to support such teachers. As a result of this proposal, James Madison wrote his great Memorial & Remonstrance against it. In it, Madison eloquently argued that a true religion did not need the support of law, that no person, either believer or disbeliever, should be taxed to support a religious institution of any kind, that the best interest of a society required that the minds of man always be wholly free, and that cruel persecutions were the inevitable result of government-established religions.

Two of the more famous quotes from Madison's pen are as follows:

> It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.
>
> Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.[13]

And Madison further stated that:

> The proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a malancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution...Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain response from his troubles.[14]

As a result of Madison's Remonstrance or protest, strong support was generated throughout Virginia, and when the proposed tax measure came up for consideration at the next session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" drafted by Thomas Jefferson.

An extreme point of interest is the preamble to the "Virginia Bill for Religious Liberty," which states that:

> Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget havits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions on either...; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the confortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.[15]

The statute itself enacted the following:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief....[16]

At this point, Jefferson then set forth the two provisions that are accepted as the foundation of "Separation of Church & State."

> That to suffer the Civil magistrate to intrude his power into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty...that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.[17]

In the foregoing two sentences is found the accepted distinction between what properly belongs to the church and what properly falls in the purview of the state. In a little more than a year after the passage of this statute, the convention met which prepared the Constitution of the United States. Of this convention, Mr. Jefferson was not a member, he being then absent as Minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his utter disappointment of the absence of an express declaration insuring the freedom of religion.[18] Jefferson indicated further that

even though he held great concern regarding the absence of such an expressed declaration, he was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations.[19] As a result of the widespread interest and concerns over the "Religious Freedom" issue voiced by both Jefferson and Madison, the States of Virginia, New Hampshire, and New York included, in one form or another, a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon.

In accordance with these expressed concerns on the part of the above-mentioned states, at the first session of the first Congress under the new Constitution, James Madison and others proposed the First Amendment to the Constitution which forbid Congress to "make any law respecting an establishment of religion or prohibiting the free exercise thereof." This proposal met with the views of the religious freedom advocates and was adopted.

Upon the subject of "religious freedom," Jefferson, in a reply to an address to him by a committee of the Danbury Baptist Association, took occasion to sum up his deep conviction regarding the subject by stating:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not American people which declared that their Legislature should 'make no law thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the Nation in behalf of the rights of conscience, I shall see, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.[20]

Summary:

The question of separation between church and state is a somewhat complex, thought-provoking issue. The "separation question" within the military establishment has become one of the major focal points of those opposing religion in the military and the chaplaincy in particular and has to be taken seriously by Chaplains. On face value, the clause in the First Amendment which states that "Congress shall make no law respecting an establishment of religion..." has been cited by some as intending to erect a "wall of separation" (barrier) between the military (state) and the chaplaincy (church). Therefore, if the chaplaincy is examined only in light of the "establishment clause" and the three constitutional tests applied to it; i.e., (1) neither a state nor the federal government can set up a church; (2) neither can a state nor the federal government pass laws which aid one religion, aid all religions, or prefer one religion over another; further, no person can be punished for entertaining or professing religious beliefs or disbeliefs, or for church attendance or non-attendance, and (3) no tax in any amount can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion, and neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa; this issue may appear to be substantiated. However, if the entire clause is addressed in concert: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," one has to take into consideration the whole issue. If addressed in the whole, all tax dollars in this regard are designed to support the overall military objectives; the chaplaincy is only a supportive role of the overall military objective. Therefore, the chaplaincy does not conflict

with the constitutionality of the "establishment clause" but in a true sense, it supports and fulfills the other basic concept in the First Amendment regarding religious liberty, "the free exercise thereof" (freedom of religious worship), which Jefferson referred to as a man's "natural rights."

To further support the conclusion that the case against the Military Chaplaincy will not be upheld by the courts, your attention is drawn to the most recent U.S. Supreme Court decision on July 5, 1983 in the case of Marsh v. Chambers, wherein the question presented was whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a Chaplain paid by the State violated the "establishment clause" of the First Amendment. The opinion of the U.S. Supreme Court, with Chief Justice Burger issuing the majority opinion of the Court, in which Justices White, Blackmun, Powell, Rehnquist and O'Connor joined, was -- no, the Chaplain activities paid for by the State were not in conflict with the "establishment clause" of the First Amendment.

For the Military Chaplaincy, the implications of the Marsh v. Chambers case so parallels the Military Case that the essential opinion issued by the Supreme Court may very well settle the pending Military Case simply because the Military Case speaks to the same basic issue -- does the practice of paying a Military Chaplain by State funds violate the "establishment clause" of the First Amendment? Chief Justice Burger pretty well answers the question in this quote from his opinion:

> No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be case aside. It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. In applying the First Amendment to the

states through the Fourteenth Amendment, Cantwell v. Connecticut, 310 U.S. 296 (1950), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, Everson v. Board of Education, 330 U.S. 1 (1946), beneficial grants for higher education, Tilton v. Richardson, 403 U.S. 672 (1971), or tax exemptions for religious organizations, Walz, supra.[21]

In a much earlier case, Justice Stewart's comments reflect the need for viewing both the "establishment clause" and the "free exercise clause" of the First Amendment as complementary and not in direct conflict with each other as some would suppose:

> The First Amendment declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....' It is, I think a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of 'separation of church and state,' which can be mechanically applied in every case to delineate the required boundaries between government and religions. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperative of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause lead to irreconcilable conflict with the Free Exercise Clause.
>
> A single obvious example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. And such examples could readily be multiplied. The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case.[22]

Conclusion:

Today's Military Chaplain lives in a fast-changing pluralistic milieu and must be prepared to face the challenges, for there will be many; accept the opportunities, for they will be numerous, and be dedicated to the proposition that obstacles which would deter the Chaplain from performing the historical peace-loving role (s)he has performed so diligently for over two hundred years and in doing so, has earned such an essential place of respect and trust in our national heritage, must be overcome.

In citing the most recent U.S. Supreme Court case embracing the "separation issue," the Court's opinion was based on the historical-constitutional elements also basic to the case against the Military Chaplaincy: "Does the practice of paying a Chaplain by state funds violate the 'establishment clause' of the First Amendment?" The U.S. Supreme Court has found that it does not! Based on this most recent court opinion addressing the "separation issue," other historical precedent and case law, it is this author's conclusion that with the present makeup of the U.S. Supreme Court, the case against the Military Chaplaincy will not be upheld as violative of the "establishment clause" of the First amendment. On the contrary, following the reasoning of both Chief Justice Burger and Justice Stewart, cited above, the Military Chaplaincy will be found to be compatible with both the "establishment" and "free exercise clauses" of the First Amendment thereby sustaining the Chaplains' essential peace-loving role. However, once the case against the Military Chaplaincy has run its course and the Chaplains' role in the Military milieu is sustained, Chaplains should not be lulled into a false sense of security thinking that the "separation issue" is closed and we no longer have to be vigilant. Past experience has taught us that the "separation

issue" will probably be raised again another day basically by those having the same "mind-set" as those who have challenged the constitutionality of the Military Chaplaincy today, as in the past. Therefore, it is the responsibility of the Military Chaplaincy to continue to walk that "fine line" existing between those constitutional safeguards found in the "establishment" and "free exercise clauses" of the First Amendment to the United States Constitution. The Chaplaincy should not allow extremes within its ranks from either side of the issue, for whatever reason, to tilt the constitutional balance established by the founding fathers as reflected in the "establishment and "free exercise clauses" of the First Amendment to the Constitution in such a way as to deny any of our Military personnel those basic constitutional guarantees afforded all Americans.

The charge to the Military Chaplaincy is to continue the faithful discharge of its duties based on those principles of religious freedom associated with the "free exercise" provision of the First Amendment with which "we, the people" have been so abundantly blessed for some two hundred years. We should not allow those who disagree with the role of the Military Chaplaincy to further deter us from the vital peace-loving role the Chaplain has played for so long within this nation's military milieu.

## NOTES

[1] Katcoff and Wieder v. The Army (1979).

[2] Cogley, Foreward, Religion & American Society 6 - Center for the Study of Democratic Institutions (1961).

[3] Chaplaincy, Katcoff and Wieder v. The Army, 1st and 2nd Quarters (1981) pp. 13-28.

[4] Everson v. Board of Education, 220 U.S. 1, (1947).

[5] Meck v. Pittinger, 95 S.Ct. 1753 (1975).

[6] Tilton v. Richardson, 403 U.S. 672, 677-678 - plurality opinion of Berger, C.J.

[7] Everson v. Board of Education, 330 U.S. 1.

[8] Zorach v. Clauson, 343 U.S., at 314.

[9] Cobb, The Rise of Religious Liberty in America (1902), pp. 338,408.

[10] Collections of the New Hampshire Historical Society, Concord, New Hampshire, VIII, pp. 3-4.

[11] Marnell, The First Amendment (1964) p. 109.

[12] Semple's Virginia Baptists, Appendix.

[13] Memorial & Remonstrance Against Religious Assessments, II Writings of Madison, p.187.

[14] Ibid p.188.

[15] 1 Jefferson Works, p. 45.

[16] 12 Hen. Stat., 84.

[17] 1 Jefferson Works, p.46.

[18] 2 Jefferson Works, p. 355.

[19] 1 Jefferson Works, p. 79.

[20] 8 Jefferson Works, p. 113.

[21] Marsh v. Chambers, S.Ct. 82-23, (1983).

[22] Justice Stewart, 374 U.S. at 308-09.

Chaplain Hall:

This is an excellent paper - systematically developed, lucid and grammatically sound. I think that it should be presented for publication - perhaps in some military journal.

If there is a criticism, the conclusion section might have been strengthened (in my judgement) if you would have dealt more fully with the challenges of the chaplain function in a pluralistic milieu along with the promises as well as the pitfalls that the chaplain of the future may/will encounter.

This document, in my view, clearly meets the CRGSC writing requirement. Congratulations for a well presented document!

Chaplain Dineen